IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ORTHOTIC SALES AND SERVICE, INC.	:	CIVIL ACTION
	:	
vs.		
	:	
THERESA LA ROSA, INDIVIDUALLY AND T/A APPLIED ORTHOTICS; MARGARET LA ROSA, INDIVIDUALLY, AND T/A APPLIED ORTHOTICS; and AUTHORIZED MEDICAL RETAIL, INC.	:	NO. 96-4377

ORDER AND MEMORANDUM

ORDER

AND NOW, to wit, this 6th day of August, 1998, upon consideration of the Motion of plaintiff Orthotic Sales and Service, Inc. to Remand Pursuant to 28 U.S.C. Section 1447(c) (Doc. No. 4, filed June 25, 1998) and the Response of All Defendants in Opposition to Motion to Remand Under Section 1447(c) & Brief in Support Thereof (Doc. No. 5, filed July 10, 1998), for the reasons set forth in the accompanying Memorandum, **IT IS ORDERED** that plaintiff's Motion to Remand Pursuant to 28 U.S.C. Section 1447(c) is **GRANTED** and the case of Orthotic Sales and Service, Inc. v. Theresa La Rosa, Individually and T/A Applied Orthotics, Margaret La Rosa, Individually and T/A Applied Orthotics, and Authorized Medical Retail, Inc. is **REMANDED** to the Court of Common Pleas of Bucks County, No. 93-05355-19-1, on the ground that this Court lacks subject matter jurisdiction.[1]

IT IS FURTHER ORDERED that defendants' request for oral argument is **DENIED**.

MEMORANDUM

Background

Plaintiff, Orthotics Sales and Service, Inc., filed a Complaint in the Court of Common Pleas of Bucks County on July 1, 1993 and an Amended Complaint was filed on December 5, 1993. In the Amended Complaint, plaintiff alleges that it entered into an oral contract with defendants under which plaintiff would sell – under the name of Applied Orthotics South – defendants' medical products in both Southern New Jersey and Pennsylvania. In exchange, defendants agreed to reimburse plaintiff for its operating expenses and pay plaintiff an additional $3,000 per month as a "management fee." According to the Amended Complaint, plaintiff billed clients on behalf of defendants' and payments were made directly to defendants; some of those payments were made by Medicare. Plaintiff alleges that defendants have breached the contract by failing to reimburse it for all of its expenses and by failing to pay it all of the "management fees" it is owed.

On May 28, 1998, defendants removed the case to this Court, asserting the existence of diversity, supplemental and federal question jurisdiction. Defendants also assert that plaintiff's president, Michael J. McGovern, has been the subject of two suits by the United States government to recover Medicare payments – a fact they only recently discovered – and that they also recently discovered that Applied Orthotics South is a

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[1] Although defendants are correct that plaintiff failed to conform to Local Rule 7.1 in filing its Motion to Remand, the Court will nonetheless reach the merits of its Motion.

fictitious entity. Plaintiff seeks to have the case remanded to state court on the basis that this Court lacks jurisdiction.

Diversity Jurisdiction

Defendants sought removal, in part, on the ground that there is complete diversity between the parties and the Court may therefore exercise jurisdiction pursuant to 28 U.S.C. **' 1332. However, 28 U.S.C. ' 1446 provides that "a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action." 28 U.S.C. ' 1446(b). While this provision has not been frequently litigated, the Court concludes that the language is unambiguous and applies to cases which were not initially removable. Thus, even if a case becomes removable (whether because a party is dismissed, creating diversity, or new facts are discovered as is alleged in this case), it may not be removed if more than a year has passed since the time the case was commenced. See Caterpillar Inc. v. Lewis, 117 S.Ct. 467, 473 (1996); Lytle v. Lytle, 982 F.Supp 671 (E.D. Miss. 1997) ("The running of this one year statute of limitations begins at the filing of the complaint – not at the time that the case becomes removable." (citations omitted)); see also Gefen v. Upjohn Co., 885 F.Supp. 123, 123-24 (E.D. Pa. 1995) ("Courts construe the removal statutes strictly, and any doubts are resolved in favor of remand." (citation omitted)).[2]**

An initial complaint was filed in this case on July 1, 1993 and an Amended Complaint was filed on December 5, 1993. As it is apparent that whichever date is chosen for the measuring period, more than a year has passed, the Court concludes that removal on the basis of the Court's diversity jurisdiction is improper.

Supplemental Jurisdiction

The Court rejects defendants' assertion that this Court has supplemental jurisdiction over the within case. The basis of this assertion is the currently pending suit brought by defendants against plaintiff under the federal RICO statute, 18 U.S.C. ' 1961 et. seq. See Larosa v. McGovern, C.A. No. 98-2983. Defendants argue that that case arises out of a "common nucleus of operative facts" and as such, confers supplemental jurisdiction over plaintiff's state law claims. However, the supplemental jurisdiction doctrine set forth in 28 U.S.C. ' 1367 applies to related claims in the same suit. See United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (holding that the exercise of pendant jurisdiction is appropriate when "the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional case" (emphasis added)); see also Lentino v. Fringe Employee Plans, Inc., 611 F.2d 474, 478 (3d Cir. 1979) ("Pendent jurisdiction, the ability of a federal court to hear a jurisdictionally insufficient claim which is linked to a jurisdictionally sufficient claim, is grounded in the interest of both the parties and the judicial system in having all of the claims between litigants both federal and state, resolved in one suit." (emphasis added)). Defendants chose to assert their RICO claims in a separate proceeding; the existence of a separate lawsuit, whether or not arising from the same common nucleus of operative facts,

[2] There is authority for the proposition that the one year period is subject to equitable exceptions. See, e.g., Ferguson v. Security Life of Denver Insurance Co., 996 F.Supp. 597, 603 (N.D. Texas 1998). However, the defendants have not raised this issue and the Court will not address it.

does not confer supplemental jurisdiction.[3]

Federal Question Jurisdiction

Defendants assert that removal was proper because the Court has federal question jurisdiction over plaintiff's claims. Defendants contend that there is a federal question first, because the government filed two related cases against McGovern involving the issue of Medicare fraud and second, because the contract alleged by plaintiff may be void under federal law as it was based on the illegal purpose to defraud Medicare. Assuming arguendo that defendants timely removed this case, the Court nonetheless concludes that it lacks federal question jurisdiction.

It is well established that a plaintiff is master of his own complaint and may avoid federal removal jurisdiction by relying exclusively on state law causes of action. See Rivets v. Regions Bank of Louisiana, 118 S.Ct. 921, 925 (1998); see also Joyce v. RJR Nabisco Holdings Corp., 126 F.23d 166, 171 (3d Cir. 1997). The Court looks to the face of the complaint in determining whether a plaintiff is relying exclusively on state remedies: this is known as the "well-pleaded complaint" rule. See Rivets at 925; Joyce at 171. Moreover, "'a case may not be removed to federal court on the basis of a federal defense, . . . even if the defense is anticipated in the plaintiff's complaint . . . .'" Rivets at 925 (quoting Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1, 14 (1984)). While it is true that a plaintiff may not avoid federal jurisdiction through an "artful pleading" which omits necessary federal claims, this doctrine applies only where "federal law completely preempts a plaintiff's state-law claim." Id. (citations omitted); see also Joyce at 171.

In this case, plaintiff's state law action is premised on a state law contract claim. Although – in his Amended Complaint – plaintiff contends that he is owed money paid by Medicare to defendants, his claim is nonetheless premised on state law. There is no suggestion that plaintiff's proper cause of action falls under a provision of Title XVIII of the Social Security Act, 42 U.S.C. '' 1395et. seq. (the "Medicare Statute"), nor does a review of federal Medicare law suggest that Congress intended that it exclusively govern contracts between providers of health care services. At most, defendants may – although the Court does not imply that they do – have a defense to that portion of plaintiff's contract claim premised on Medicare reimbursement. As stated, however, a defense under federal law – even a complete one – does not confer removal jurisdiction on a federal court. Such is the case here, and the Court accordingly concludes that it lacks federal question jurisdiction over plaintiff's Amended Complaint. See, e.g., State of New York v. Lutheran Center for the Aging, Inc., 957 F.Supp 393, 398-400 (E.D.N.Y. 1997) (holding that liability for Medicaid payments paid by New York to defendant which New York alleged should have been paid under Medicare is determined by state law and there was no basis for federal jurisdiction); Massachusetts v. Philip Morris Inc., 942 F.Supp. 690 (D. Mass. 1996) (holding that state contract claims involving Medicare payments were not removable); Venacare U.S.A., Inc. v. Alternative Health Group, Ltd., C.A. No. 94-4088, 1995 WL 120088, *2 (E.D.

[3] Defendants also argue that the case, United States v. Warning, McGovern, et. al., C.A. No. 93-4541, involved "related matters" and is "strikingly similar" to the within case. For the reasons set forth above, this is not enough to confer supplemental jurisdiction.

La. March 16, 1995) ("Although one issue in this case, the payment of Medicare reimbursement funds, may involve the application of federal law, this issue is not a federal question with respect to the lawsuit in its entirety. The breach of contract claims alleged in Plaintiffs' complaint are not governed by the Social Security Act and do not arise under the laws of the United States.").[4]

Conclusion

For the foregoing reasons, the Court has granted plaintiff's Motion to Remand Pursuant to 28 U.S.C. ' 1447(c) and has ordered the case remanded to the Court of Common Pleas of Bucks County.

BY THE COURT:

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JAN E. DUBOIS

[4] Defendants rely on Westmoreland Hospital Association v. Blue Cross of Western Pennsylvania, 605 F.2d 119 (3d Cir. 1979), for their proposition that the issue of Medicare fraud creates federal question jurisdiction for removal purposes. In Westmoreland, however, the plaintiffs "gratuitously volunteered on the face of their complaint legal conclusions based on federal statutes and regulations." Id. at 123. Such is not the case here. Moreover, Westmoreland predates Supreme Court precedent which cautions that care must be exercised when determining whether an action "arises out of" federal law for removal purposes simply because it requires interpretation of a federal statute. See Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 809 (1986); see also Hunter v. Greenwood Trust Co., 856 F.Supp. 207, 217 (D.N.J. 1992). Thus, the Court concludes that Westmoreland is inapposite to the instant matter.